No. 16,358

IN THE

United States Court of Appeals for the Ninth Circuit

HARRY H. MEISNER,
Appellant,
vs.
RELIANCE STEEL & ALUMINUM CO.,
a Corporation, and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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SUBJECT INDEX

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STATUTES

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STATEMENT AS TO JURISDICTION

The facts sustaining jurisdiction of the District Court are set forth in Paragraph 1, Count 1, of plaintiff's Amended Complaint (R. 7). Jurisdiction is based on Diversity of Citizenship, Plaintiff being a citizen and resi-

dent of the State of Michigan, and the Defendants being a corporation incorporated under the laws of the State of California and a National Banking Association with offices and principal places of business within said district; and also upon the amount at issue which exceeds the sum of three thousand dollars, exclusive of interest and costs (R. 113). (Note: this action was commenced prior to the amendment increasing jurisdictional amount.) The amount claimed in the *ad damnum* clause, $75,000 (R. 10) is in excess of the jurisdictional amount. The District Court had jurisdiction under U. S. C. Tit. 28 Sec. 1332.

Jurisdiction of the Court of Appeals on appeal from the judgment, of the District Court, is established by U. S. C. Tit. 28 Sec. 1291.

STATEMENT OF QUESTIONS INVOLVED

Plaintiff and Appellant's specification of points, assignments of error and reasons and grounds for appeal are set forth at length in the printed record pages 116-8 and are adopted herein. Plaintiff has argued the following propositions:

I. SUMMARY JUDGMENT MAY NOT BE GRANTED IF TRIABLE ISSUES OF FACT ARE PRESENTED, AND THE BURDEN IS UPON THE MOVING PARTY TO ESTABLISH THAT NO SUCH ISSUES EXIST.

II. PLAINTIFF ADDUCED OR OFFERED CREDIBLE TESTIMONY ON EACH MATERIAL POINT IN SUPPORT OF HIS COMPLAINT, THEREBY RAISING ISSUES OF FACT WHICH COULD NOT BE DISPOSED OF BY MOTION FOR SUMMARY JUDGMENT.

III. DEFENDANTS BY THEIR REFUSAL TO COMPLETE THE SALE TO A READY, WILLING AND ABLE PURCHASER, HAVE WAIVED THE CONDITION THAT PLAINTIFF'S

COMMISSION WAS PAYABLE UPON CLOSING OF A SALE.

IV. PLAINTIFF WAS NOT REQUIRED TO HAVE A REAL ESTATE BROKER'S OR BUSINESS OPPORTUNITY BROKER'S LICENSE TO ENTITLE HIM TO EARN A COMMISSION FOR FINDING A PURCHASER FOR DEFENDANT'S BUSINESS.

V. NO PRESENTATION OF CLAIM TO THE STATE APPOINTED EXECUTOR WAS REQUIRED AS A PREREQUISITE TO ACTION IN THE FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP.

STATEMENT OF FACTS AND PROCEEDINGS

This is an action by the plaintiff Meisner, a citizen and resident of Michigan, against two California defendants, to recover upon an alleged commssion agreement for finding a purchaser ready, willing and able to purchase or acquire the assets of Reliance Steel & Aluminum Co. or the capital stock thereof on terms mutually agreeable, (Amended Complaint, Pars. 4 and 5, R. 7 and 8). Such commission was payable at the completion of sale.

The defendants are Reliance Steel & Aluminum Co., herein called "Reliance", and Security-First National Bank of Los Angeles as Executor of Thomas J. Neilan, during his lifetime the principal stockholder of Reliance, and a party to the alleged agreement (R. 7 and 8).

It is plaintiff's contention that he found such a purchaser namely Myron Hokin, individually and as agent for H. W. & G. Corporation, on terms mutually acceptable; that an agreement (Exhibit B, R. 79-84) was entered into covering such sale; that the purchaser made a deposit of $250,000 (Exhibit A, R. 78) and was ready to perform

on his part, but that defendants then refused to go through with the sale. That defendants thereby waived and are estopped to assert the condition requiring consummation of the sale.

In response to requests for admissions, defendants admitted (Response No. 4, R. 45) that Reliance was willing to sell and lease on the terms of Exhibit B, and that Neilan was willing that Reliance make such sale. Also (Response No. 5, R. 45-6) that Neilan's signatures to the instrument were genuine, and that he was duly authorized to execute same.

As to the question (Request No. 6, R. 46) whether Hokin and H. W. & G. Corporation were ready, willing and able to perform Exhibit B, defendants did not admit, but also did not deny same, for claimed want of knowledge.

In the beginning Reliance had a commission agreement with one Jack Moore for the sale of its assets.

On July 20, 1957, Mr. Gimbel, then an officer and now President of Reliance, visited Mr. Meisner's office at Detroit. There are conflicting statements as to what occurred. Meisner states in his affidavit that he refused to divulge the purchasers' identity without a written commitment that he would receive a commission in the event of a sale (R. 107). This conversation is referred to in Mr. Gimbel's letter of July 30, 1957 (R. 87).

In the meantime, Moore and Meisner reached an agreement for equal division of the fees in Exhibits C (R. 85) and D (R. 86).

Thereafter, there was discussion and correspondence between the parties regarding the commissions.

Finally, after the purchase agreement had been signed on October 2, 1957 (Exhibit B, R. 79-84) Mr. Neilan,

President of Reliance, wrote Meisner (Exhibit G, R. 89) asking "I wish you would write me confirming your agreement to split your half of the commission".

And again on November 12, 1957 (Exhibit H, R. 89) Neilan wrote Meisner asking him to sign the enclosure (Exhibit J, R. 90) and return same to him by return Air Mail. Exhibit J, (R. 90) is the letter prepared for Meisner's signature by Neilan. In it, he refers to "Our understanding" that the commission of 5% of first million and 2½%" (on excess)—"has been reduced to one half such amount". Also that "It is understood that my one-half of such reduced amount, as my share of the commission or brokerage, will be paid to me direct—".

Meisner did not sign Exhibit J but instead prepared Exhibit L (R. 93) which is substantially the same as Exhibit J, but specifies the amount of the fee ($30,000). This letter was mailed November 18, 1957.

Unfortunately, Mr. Neilan died on November 18, 1957 and his successors have been unwilling to complete the sale. They have likewise refused to pay Meisner's commission.

There is no dispute that the original employment was contingent upon consummation of the sale.

However it is plaintiff's position, which will be supported at the trial by the testimony of the purchaser, Hokin, that purchaser was ready, willing and able to complete the purchase agreement, Exhibit B (R. 78-84) but that Reliance refused to do so after Neilan's death. It is plaintiff's contention, defendants thereby waived performance of the condition as to completion of sale, and are estopped from raising a failure of performance which results from their own refusal.

In their respective answers, the defendants made a general denial, and pleaded as special affirmative defenses that plaintiff had failed to join a necessary party (Moore), (not covered in the court findings) that plaintiff could not recover because he had no real estate or business chance license, and, although an attorney in Michigan, was not admitted to practice in California, rendering his services illegal.

In addition the executor pleaded an additional defense that the claim was not filed with the executor in the manner provided by the California laws (R. 11-14; 14-18).

Demands for admissions were made by both parties, and plaintiff submitted to interrogatories by defendants.

Thereafter defendants made motion for summary judgment (R. 60).

Despite plaintiff's verified answer to such motion (R. 99-111) wherein it was pointed out that plaintiff had adduced Direct and Credible Evidence upon all material points, the Court below granted such motion, adopting as reasons defendants' proposed findings of Fact and Conclusions of Law (R. 112).

Plaintiff on appeal has specified the points, assignments of Error and Reasons and Grounds for Appeal appearing in the Record (116-8).

ARGUMENT

I. SUMMARY JUDGMENT MAY NOT BE GRANTED IF TRIABLE ISSUES OF FACT ARE PRESENTED, AND THE BURDEN IS UPON THE MOVING PARTY TO ESTABLISH THAT NO SUCH ISSUES EXIST.

As will be established in the argument under part II of this brief (page 8), plaintiff adduced credible testimony on each material point in support of his complaint, thereby raising issues of fact which could not be disposed of by motion for summary judgment.

This Court has heretofore ruled in *Byrnes v. Mutual Life Insurance Co. of N. Y.* (C. C. A. 9, 1954) 217 F. 2d 497 that:

> "The movant for summary judgment has burden of showing there is no triable issue of fact presented".

See also:

Pickle v. Trimmell (Pa. 1950) 93 F. S. 823;
Jensen v. Macartney (D. Minn. 1951) 95 F. S. 598;
Caylor v. Verden (C. C. A. 8 1955) 217 F. 2d 739;
SMS Mfg. Co. Inc. v. U. S. Mengel Plywoods, Inc. (C. C. A. 10 1955) 219 F. 2d 606.

In the Caylor case, the Court said that all doubts are resolved in favor of the opposite party.

This Court has likewise held in the case of *Guerrero v. American Hawaiian Steamship Co.* (C. C. A. 9 1955), 222 F. 2d 238 that:

> "Summary judgment may not be granted where moving papers and affidavits indicate a substantial dispute of material facts."

Same: *Lane Bryant Inc. v. Maternity Lane* (C. C. A. 9 1949) 173 F. 2d 559.

The Court below not only made no finding on the important issues of Waiver and Estoppel, but defendants had stated their inability to admit or deny the facts essential thereto, Response No. 6, R. 46. As shown in the next section, plaintiff presented credible evidence on all issues.

It is respectfully submitted that the Court below erred in granting defendant's motion for summary judgment.

II. THAT PLAINTIFF ADDUCED OR OFFERED CREDIBLE TESTIMONY ON EACH MATERIAL POINT IN SUPPORT OF HIS COMPLAINT, THEREBY RAISING ISSUES OF FACT WHICH COULD NOT BE DISPOSED OF BY MOTION FOR SUMMARY JUDGMENT.

Aside from defendants' affirmative defenses of lack of broker's or other licenses, and failure to comply with California claim procedure, plaintiff's burden of proof as to the existence of a contract and its performance or waiver are fairly simple. These include the allegations:

(A) That defendants employed plaintiff and one Jack Moore to:

a. find a purchaser ready, willing and able to purchase or acquire the assets or capital stock of defendant Reliance Steel & Aluminum Co.,

b. on terms mutually agreeable,

c. for a commission of 5% on the first $1,000,000 and 2½% of the remainder of the purchase price,

d. that such commission was to be payable on the completion of the sale.

(B) That thereafter it was agreed that defendants would pay one-half of the commission direct to plaintiff and one-half to Jack Moore;

(C) That plaintiff performed the contract on his part by finding a purchaser ready, willing and able to purchase, namely Myron Hokin and H. W. & G. Corporation, who entered into the agreement Exhibit B (R. 79-84) and made the deposit of $250,000, Exhibit A (R. 78);

(D) That defendants waived the condition that the sale be completed by their refusal to go through with the sale, although the purchaser was ready, willing and able to complete.

In support of these issues, plaintiff was prepared to introduce evidence at the trial, including defendants' admissions in the responses to plaintiff's first request for admissions (R. 42-7); the various exhibits introduced in this cause; the testimony of plaintiff, and the proposed testimony of Myron Hokin to the effect that he stood ready to complete the purchase, but that defendants refused to go through with the sale. This testimony would have sustained plaintiff on each of said issues as follows:

A. The existence of the commission agreement is clearly evidenced by the letter, Exhibit H (R. 89) from Mr. Neilan as Reliance's president to plaintiff on November 12, 1957, and the enclosure Exhibit J (R. 90) which Mr. Neilan prepared for Meisner's signature and which contains the following language:

> "This will conform our understanding that the commission of 5% on the first million dollars and 2½% on any amount above the first million dollars of the net purchase price * * * has been reduced to one-half such amount. * * *
>
> "It is understood that my one-half of such reduced amount * * * will be paid direct to me upon conclusion of the escrow. * * *"

Substantially this same language appears in Meisner's letter of November 18, 1957, Exhibit L (R. 93).

Defendants have never denied that they originally had an arrangement with Moore for such a commission (See Ex. E, R. 87) or the agreement between plaintiff and Moore as to the splitting of such commission set forth in their proposed findings of fact No. 5 (R. 65).

We submit that the existence of this agreement to pay plaintiff a commission and to pay it direct is established by defendants' own writing, Exhibits H and J (R. 89-91).

B. That plaintiff's half of the commission would be paid to him direct.

This understanding is likewise established by Exhibit J (R. 90-91) prepared by Mr. Neilan for plaintiff's signature and enclosed in the letter Exhibit H (R. 89).

In it Mr. Neilan asks Meisner to sign the statement that "it is understood that my one-half of such reduced amount * * * will be paid direct to me * * *".

C. That plaintiff performed his agreement by finding a purchaser ready, willing and able to purchase on terms mutually agreeable.

In performance of his agreement, plaintiff produced a purchaser, who it will be shown by evidence at the trial was ready, willing and able to purchase on terms mutually agreeable. (See verified answer to motion for summary judgment, R. 105.)

Thereafter defendants and said purchaser, Myron Hokin, acting individually and as agent for H. W. & G. Corporation, entered into the agreement Exhibit B (R. 79) with Rider (R. 83).

In response to plaintiff's request for admissions, defendants admitted in Response No. 4 (R. 45):

> "That * * * defendant Reliance * * * was willing to sell and lease the property described in said Exhibit B * * * on the terms and subject to the conditions therein set forth * * *; further admit that Thomas J. Neilan was then willing that Reliance * * * sell * * * on such terms * * *".

In response to plaintiff's request No. 6 (R. 46) that defendants admit that Hokin and H. W. & G. Corporation were ready, willing and able to perform, defendants responded that they

> "cannot truthfully admit or deny" etc. * * * "for the reason that defendants have no knowledge of the intent or financial ability of said Myron Hokin or said H. W. & G. Corporation" etc.

As against defendants' claimed lack of knowledge on this point, it is undisputed that Hokin made the $250,000 deposit (see Exhibit A, R. 78) required by the sales agreement, Exhibit B (R. 82). Plaintiff in his sworn answer to defendants' Motion for Summary Judgment (R. 104) stated that he

> "proposes in this case to establish by the testimony of Myron Hokin that * * * he and the H. W. & G. Corporation were in fact ready, willing and able to complete such purchase but that after Mr. Neilan's death defendants were unwilling to go through with the deal."

D. That defendants waived the condition that a sale be completed by their refusal to go through with the sale although the purchaser was ready, willing and able to purchase.

In the sworn answer to the motion for summary judgment (R. 104) plaintiff stated that at the trial he would offer the testimony of Myron Hokin that the prospective purchasers remained ready willing and able to purchase but that after Mr. Neilan's death, defendants were unwilling to go through with the deal. In Argument III, page 13 of this brief, plaintiff will discuss the effect of such refusal as a waiver of the condition as to closing.

III. DEFENDANTS BY THEIR REFUSAL TO COMPLETE THE SALE TO A READY, WILLING AND ABLE PURCHASER, HAVE WAIVED THE CONDITION THAT PLAINTIFF'S COMMISSION WAS PAYABLE UPON CLOSING OF A SALE.

In his complaint, (Amended Complaint, Par. 6, R. 9), plaintiff did not claim that the sale on which his right to commission was contingent had actually been completed but instead claimed that although the purchasers, Hokin and his corporation, were ready, willing and able to complete the purchase agreement, Exhibit B (R. 79), that the defendants themselves refused to complete the sale, and that defendants are estopped to set up as a defense the non-performance of a condition resulting from their own refusal to go through with the sale.

In other words, that defendants had waived the condition of completion of the sale.

In this course, he was relying on the well recognized rule that a party to a contract cannot raise as a defense non-performance of a condition of which he has refused to permit performance. Whether plaintiff's employment originated in Michigan or California, this rule is the same. See:

Richardson v. Walter Land Co. (2d D. C. A., Cal., 1953), 258 Pac. (2d) 42;
Taylor v. Simi Const. Co., 23 Cal. App. 308, 137 Pac. 1095;
Greenberg v. Sakwinski, 211 Mich. 498, 179 N. W. 234;
Hayes v. Beyer, 284 Mich. 60, 278 N. W. 764.

In *Richardson v. Walter Land Co. supra,* plaintiff claimed a commission for finding defendant a loan. The

Court found that plaintiff produced a lender ready willing and able to make the loan on terms acceptable to the defendant corporation as borrower, and an escrow was opened and duly signed and executed by the borrower and lender to consummate the sale. However, defendant then refused to pledge the collateral required, and abandoned the transaction. Headnote 5 of that case reads as follows:

> "Borrower which precluded by its own remissness the materialization of the loan could not take advantage of such act to defeat its liability for commission due the broker who procured lender on terms which the borrower had agreed upon".

In the *Taylor* case, *supra,* defendant in consideration of certain services agreed to pay plaintiff $1000 three days after water was turned on in defendant's water mains. However, defendant abandoned the project and never constructed the lines. Its defense was failure of the condition. In holding for plaintiff, the Court said:

> "defendant having agreed to make payment within a stated time after the happening of an event, could not, by refusing to permit that event to occur, escape liability on its contract".

The *Taylor* case is cited with approval in the Michigan case of *Hayes v. Beyer,* above. In that case, the first headnote reads as follows:

> "Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability."

This situation is even more aptly covered by the following quotation from *Greenberg v. Sakwinski,* the Michigan case cited above.

> "The claim that no commission was payable or owing until title passed and the sale was consummated, under the language of the contract that payment was to be 'made at the time of settlement of the sale' calls for no extended discussion. If plaintiff fully performed on his part and defendant's malconduct rendered it impossible to make settlement of the sale according to the land contract he had signed, he is estopped from taking advantage of his own wrong."

In his sworn answer to defendants' motion for summary judgment, plaintiff stated that he proposed to establish by the testimony of Myron Hokin that Hokin and H. W. & G. Corporation, the purchasers, under Exhibit B, were ready, willing and able to complete the purchase but that after Mr. Neilan's death, defendants were unwilling to go through with the deal.

As pointed out in the Argument Part I, on motion for summary judgment, the burden of proof is on the moving party, and well pleaded facts must be accepted.

Yet instead of submitting evidence defendants completely denied any knowledge on this subject. In response to plaintiff's Request for Admission, defendants stated that they (No. 6, R. 46).

> "cannot truthfully admit or deny that Myron Hokin * * * was ready, willing and able to purchase the property * * * for the reason that defendants have no knowledge of the intent or financial ability of said Myron Hokin * * *".

We submit that the Court below was in error in its refusal to consider this question of waiver and estoppel, and in granting defendants' Motion for Summary Judgment without a trial of such issue.

IV. PLAINTIFF WAS NOT REQUIRED TO HAVE A REAL ESTATE BROKER'S OR BUSINESS OPPORTUNITY BROKER'S LICENSE TO ENTITLE HIM TO EARN A COMMISSION FOR FINDING A PURCHASER, READY, WILLING AND ABLE TO BUY DEFENDANTS' BUSINESS.

In his declaration, plaintiff alleged a commission agreement "to find a purchaser ready, willing and able to purchase or acquire the assets of said Corporation" (Amended Complaint, par. 4, R. 8).

In their respective answers and motion for summary judgment, the defendants raised an affirmative defense that for such activities, plaintiff was required to have a Real Estate Broker's or Business Chance Broker's License and that his admitted lack of either license rendered the commission agreement illegal.

But no such license is required under the California statutes for merely finding a purchaser of real estate or businesses.

Crofoot v. Spivak, 113 Cal. App. (2) 146, 248 Pac. (2) 45;
Shaffer v. Beinhorn (Cal. Sup. Ct. 1923), 190 Cal. 569, 213 Pac. 960;
Palmer v. Wahler (3rd D. C. A. Cal. 1955), 285 Pac. (2) 9.

In *Crofoot v. Spivak* above, the second headnote reads as follows:

> "Plaintiff who agreed to introduce prospective buyers of sawmills and timber to defendant in return for $2500 in even of sale to prospects was not a 'real estate broker' within statute licensing real estate brokers and prohibiting operations of those not properly licensed, and was entitled to fee though unlicensed".

We believe this applies directly to the facts of this case.

In addition, the California Court said in *Palmer v. Waller* above (page 12):

> "It therefore appears that the law in California as originally announced by our Supreme Court in *Heyn v. Phillips supra,* and followed in the *Shaffer* case is that a so-called 'finder's agreement' falls neither within the purview of the statute of frauds, nor the real estate licensing act."

The facts are that plaintiff is a Michigan attorney with offices at Detroit. That he had a prospect at Chicago, Illinois interested in buying a steel mill, and that the first contact between the parties was on July 20, 1957, when Mr. Gimbel, defendant's present president, visited plaintiff's office at Detroit, at which time plaintiff asked a commission and refused to divulge his client's identity without a commitment that he would receive a commission in the event of consummation of a sale. (Plaintiff's sworn answer to defendants' motion, R. 106-7.)

It should also be noted that in connection with the proposed sale, defendants had reserved their own freedom of action (Exhibit E, R. 87) and had other brokers interested in the property (Gimbel Affidavit, R. 95). Also defendants had their own staff of negotiators and attorneys as indicated by the many exhibits submitted by defendants.

Under the California cases cited above, no license was required for plaintiffs employment to find a purchaser.

V. NO PRESENTATION OF CLAIM TO THE STATE APPOINTED EXECUTOR WAS REQUIRED AS A PREREQUISITE TO ACTION IN THE FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP.

The court found that no action would lie against the defendant, Security-First National Bank, as Executor of the Estate of Thomas J. Neilan, because the claim was not first submitted to the Executor before suit was commenced in the Federal Court.

However it should be noted that if such presentation was required as a condition precedent to action in Federal Court, which plaintiff believes is not the law, it was certainly cured by said defendant's admission in its answer (R. 15) that such claim was presented to it on June 11, 1958, prior to plaintiff's amended complaint, filed July 3, 1958 (R. 10) and its admissions in Response No. 3 (R. 44) that such claim was rejected by the Executor on June 30, 1958, also prior to plaintiff's amended complaint filed on July 2, 1958.

California law does not prevent suit after denial of claim, and it is submitted that the amendment of complaint to plead such additional facts after the executor's denial of the claim would satisfy any requirement for presentation in the State Court.

But if it is defendants' contention that the California statutes could completely bar action in the United States District Court based on the necessary Diversity of Citizenship, then it is in error, as was the Court below in denying its own jurisdiction.

This question has been answered many times by the United States Supreme Court, but very clearly in *Clark v. Beaver,* 139 U. S. 96; 35 L. Ed. 88; 11 S. Ct. 468:

> "The controverted question or debt or no debt, is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right given by the Constitution of the United States to have tried originally or by removal, in a Court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents."

(See also *Hess v. Reynolds,* 113 U. S. 73) (28 L. Ed. 927; 5 S. Ct. 377.

RELIEF

It is therefore respectfully submitted that the order granting summary judgment for defendants and dismissing the action should be reversed and the case remanded to the District Court for trial on its merits.

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